HUMAN RIGHTS

A BACKGROUND PAPER

Yukon
Justice
Roger Kimmerly, Minister

BACKGROUND PAPER

ON

HUMAN RIGHTS

DECEMBER 1985

FOREWORD

This Paper is enjoying its third printing. Titled "Human Rights - A Green Paper", it was first issued by Clarke Ashley, Minister of Justice, in March 1984, and then by the Late Andy Philipsen, Justice Minister, in August 1984.

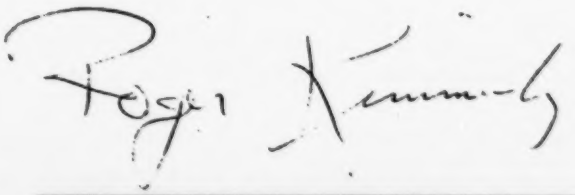
Our government has now tabled its intentions, in Bill 58 - The Yukon Human Rights Act. However, because the information in this Paper is still valid, and will be useful to Yukoners as discussion is generated on the Bill, I am re-issuing it as a Background Paper. Aside from some editorial changes and updating, the Paper remains basically unchanged. It is not, therefore, a summary, or explanation of Bill 58 which was tabled in October 1985.

I should mention that some significant developments in human rights have occurred since the Paper's first printing. Most notable of course, is the fact that the equality rights guarantees in section 15 of the Canadian Charter of Rights and Freedoms have been in effect since April 17, 1985. The Parliamentary Committee on Equality Rights, established to examine, inquire into and report on equality rights under the Charter, submitted its Report to the House of Commons on October 25, 1985. The Canadian Government has 120 days to provide its response to that Report.

In March 1984 the Parliamentary Task Force on Participation of Visible Minorities in Canadian Society submitted its Report. The Government of Canada has since issued its Response to the 80 recommendations, committing itself to the full development of a dynamic and socially harmonious multicultural and multiracial society.

We also have the benefit of Judge Rosalie Abella's Royal Commission Report on "Equality in Employment", October 1984. This is the result of an inquiry into the most efficient, effective and equitable means of promoting employment opportunities eliminating systemic discrimination.

Our government has considered our Constitutional obligations, and our obligations under various international Covenants. We believe Bill 58 meets these obligations and extends to Yukoners the rights afforded to citizens in other Canadian jurisdictions.



The Honourable R.S. Kimmerly
Minister of Justice

December 1985

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I. CANADA'S INTERNATIONAL HUMAN RIGHTS COMMITMENTS

On December 10, 1948, the United Nation's General Assembly proclaimed the Universal Declaration of Human Rights. For the first time, nations representing a majority of the world's population agreed on a common standard of human rights, and on the fundamental importance of protecting the human rights of all people.

Since its proclamation, the Universal Declaration has had wide impact throughout the world, inspiring national constitutions and laws, as well as specific resolutions such as the Declaration on the Rights of Disabled Persons in 1975.

Nevertheless, the Universal Declaration of Human Rights remains a statement of ideals. It is not more than morally binding on member states of the United Nations. Some of those members, in seeking a more forceful agreement, pressed for creation of treaties which would establish real obligations on the part of member states.

As a result, two Covenants were drawn up and came into force in 1976. Because they are treaties, their provisions do not apply to all nations -- only to those that decide to ratify them. To date, more than 70 of the United Nations' 155 members, including Canada, have ratified each one.

The first Covenant, the International Covenant on Economic, Social and Cultural Rights, deals primarily with collective rights -- rights which are due to all people of a society in order to maintain basic social, cultural and economic standards. A country ratifying this Covenant acknowledges its responsibility to promote better living conditions for its people. It recognizes everyone's right to work, to fair wages, to social security, to adequate standards of living and freedom from hunger, and to health and education. It also undertakes to ensure the right of everyone to form and join trade unions.

The second Covenant, the International Covenant on Civil and Political Rights, together with its Optional Protocol, deals with individual rights -- freedom and responsibilities which individual citizens must be allowed to exercise and protections from state actions. A country ratifying this Covenant undertakes to protect its people by law against cruel, inhuman or degrading treatment. It recognizes the right of every human being to life, liberty, security and privacy of person. The Covenant prohibits slavery, guarantees the right to a fair trial and protects persons against arbitrary arrest or detention. It recognizes freedom of thought, conscience and religion; freedom of opinion and expression; the right of peaceful assembly and of emigration; and freedom of association.

Article 2 of both Covenants states that each state party to the Covenants undertakes to guarantee to all individuals that the rights enunciated will be exercised without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Optional Protocol to the Covenant on Civil and Political Rights enables the U.N. Human Rights Committee to consider communications from private individuals claiming to be the victims of a violation by a State party to that Protocol of any of the rights set forth in the Covenant. Individuals must have already exhausted all available domestic remedies. The Human Rights Committee submits annual reports to the General Assembly of the United Nations.

In addition to these two central Covenants, the United Nations has also developed a number of Conventions which apply to specific human rights areas. Canada has ratified the Convention on the Elimination of All Forms of Racial Discrimination, which came into force in 1969, and the Convention on the Elimination of All Forms of Discrimination Against Women, which came into force in 1982. Indeed, as of January, 1982, Canada had ratified 23 principal international conventions on human rights.

Implementation Measures

In Canada, international convention or treaty law only has the force of law once ratified or acceded to (by the government) and then incorporated into domestic legislation (by Parliament or legislatures). This is in contrast with the American view, which hold that ratification of international documents automatically entails incorporation into domestic constitutional law.

Because Canada is a federal state, the concurrence of the provincial and federal governments is necessary before Canada can accede to any international treaty. In connection with the implementation of international human rights undertakings, cooperative action is therefore required from all levels of government because of the exclusive nature of the legislative power of each, and since many issues of human rights involve aspects which in Canada are partly within the federal legislative competence, and partly with provincial/territorial legislative jurisdiction.

States ratifying international covenants undertake to submit periodic reports to the United Nations on the measures they have adopted, and the progress made towards realizing these rights in their domestic legislation. Where rights recognized in the Covenant on Civil and Political Rights, for example, are not already provided for in the domestic sphere, each State Party "undertakes to take the necessary steps, in accordance with its constitutional processes to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant".

Summarily, the constitutional position in Canada is that where the subject of the particular international obligation is within the legislative power of the federal government, the federal Parliament must see to its incorporation into Canadian law. Where the subject is within provincial or territorial legislative competence, the

responsibility for implementation remains a matter of provincial or territorial legislation.

The statutes in Canada which are of immediate relevance to implementing international human rights law, are the Human Rights Acts. Each of the provinces and territories has enacted human rights legislation, and there is also a federal Act in this area. These statutes are examined in detail later in the Paper.

The Canadian Charter of Rights and Freedoms, which constitutes Part I of the Constitution Act, 1982, may be regarded as giving local effect to Canada's international human rights obligations to a considerable degree. The Charter will be discussed in detail in the next section, but it should be noted here that it is no coincidence that the Charter happens to satisfy many of Canada's international human rights obligations, since it was framed in light of their requirements.

To facilitate Canada's reporting obligations to the United Nations, Federal, Provincial and Territorial Ministers responsible for Human Rights meet periodically to discuss the preparation of reports. In 1975, Ministers established a Continuing Committee of Officials, which serves to coordinate, domestically, the implementation by the government sector of Canada's international human rights obligations.

Conclusion

Why raise the issue of international law? Apart from the moral persuasiveness of these human rights standards, reference to the covenants signals that each jurisdiction in Canada does have international human rights obligations. They recognize that every citizen is to enjoy certain civil, political, economic, social and cultural rights without discrimination, and specifically without discrimination based upon the enumerated grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Therefore, as classes or grounds of discrimination are examined later in the Paper, it is suggested that the Covenants, binding upon all Canadian jurisdictions, are the first place where one can look for guidance in the expansion of existing prohibited grounds of discrimination.

II. A BRIEF OVERVIEW OF DISCRIMINATION AND THE LAW IN CANADA

The following is a very brief, historical overview of discrimination in Canada, and the various laws which have come into existence in an attempt to combat it.

Before Confederation, race relations began with slavery. It was not officially ended in the British North American Colonies until the 1833 Act for the Abolition of Slavery of the Imperial Parliament abolished slavery in the British Empire.

The west coast of Canada became the centre of new racial disharmony not many decades later. With the building of railroads and the opening of mines, large numbers of Chinese labourers were brought to British Columbia. Although the subsequent story of the many measures taken is far too detailed to describe here, there were federal and provincial laws withholding the franchise from Asiatics, as well as from the native peoples until after World War II. These laws restricted and segregated land ownership, restricted employment and business opportunities, and even went so far as to make it an offence for white women to be employed by them.

Legislation to prohibit discrimination on grounds of sex, like that to overcome racial discrimination, did not come until the 1950's, with the enactment of equal pay legislation, and the first statutes prohibiting discrimination on grounds of sex.

The British North America Act (BNA Act)

Until 1982, the BNA Act was the fundamental constitutional document of Canada. However, with some limited exceptions, the BNA Act provided almost no constitutional guarantees for civil liberties. Civil liberties include fundamental freedoms such as freedom of speech, religion and assembly; the right to vote; and equality rights. Some

civil liberties which are guaranteed by the BNA Act are the rights and privileges of denominational schools, representation by population, and the limiting of Parliament to five-year terms.

Since civil liberties were not specifically protected under the BNA Act, provincial, territorial and federal governments could pass laws which limited the civil liberties of Canadians without fear of having their laws ruled unconstitutional. A law was considered unconstitutional only if it dealt with a matter that was not within the jurisdiction of the government that passed it, and therefore its effect on civil liberties was of no concern.

The Canadian Bill of Rights

When John Diefenbaker introduced the Canadian Bill of Rights in 1960, he envisioned a law which would protect the fundamental freedoms and egalitarian rights of all Canadians. Unfortunately, this was not the effect of the Bill of Rights. It was, in the first place, an Act of Parliament, and therefore applied only to the federal government and agencies, not to provincial governments. Secondly, since it did not form part of Canada's Constitution, it was subject to amendment or repeal by Parliament, and did not take clear precedence over other laws. There was only one decision in which the Supreme Court of Canada used the Bill of Rights to render legislation inoperative because of its discriminatory impact — Section 94(b) of the Indian Act.

Provincial, Territorial and Federal Legislation

During the 1950's and 1960's provincial and territorial governments introduced human rights legislation. Today, all jurisdictions in Canada have laws which protect certain human rights. The laws vary from jurisdiction to jurisdiction, but the objects of the laws are basically the same — to further public policy that every person is free and equal in dignity and rights, and to discourage discrimination.

However, human rights legislation which prohibits discrimination and protects the rights to equality, is subject to change by the legislature. That is, prior to the enactment of the Charter of Rights and Freedoms, legislatures and Parliament could limit or repeal certain human rights. This is a principle known as legislative supremacy; a doctrine that Parliament and the legislature have an unfettered ability to pass laws on any subject matter within their jurisdiction. It was for this reason that the entrenchment of the Charter of Rights and Freedoms in our Constitution was called for.

The Charter of Rights and Freedoms

On April 17, 1982, Her Majesty, Queen Elizabeth, gave royal assent to the Canada Act. This Act makes the Constitution Act, 1982 the supreme law of Canada, and declares that no law of the United Kingdom passed after April 17, 1982 shall apply to Canada.

A large part of the Constitution Act concerns itself with Canada's traditional constitutional debate, the separation of powers between provincial and federal governments. It adds to and repeals certain sections of the BNA Act. What distinguishes the Constitution Act from its predecessor, the BNA Act, is that the new Constitution Act specifically includes certain human rights and civil liberties as a basic part of our constitutional law. These are contained in Part I of the Act, which is called the Canadian Charter of Rights and Freedoms. The Charter protects the rights of all Canadians in such areas as fundamental freedoms, democratic rights, mobility rights, legal rights, and equality rights.

The federal, provincial and territorial governments are all bound by the provisions in the Charter when passing, repealing or amending statutes, and in the administration of government and the law. The Charter is not applicable to private action though. For example, a corporation or individual who, in the course of commercial activity

discriminates on the basis of race in letting an apartment, or hiring, has committed no breach of the Charter, and the person discriminated against has no remedy under the Charter. There would, however, be a breach of a provincial or territorial human rights statute if "race" was a prohibited ground of discrimination, and the person would have a statutory remedy under that legislation.

So, very generally, the Charter applies to all governmental action which depends on statutory authority, and federal, provincial and territorial human rights legislation applies to private actions in the areas of employment, accommodation and services to the public.

The equality rights in the Charter are stated in Section 15:

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

These equality rights guarantees came into effect on April 17, 1985, after a three-year delay,to give governments the opportunity to review and if necessary, amend their legislation in light of this section. All legislation -- federal, provincial and territorial, must be non-discriminatory.

The rights and freedoms contained in the Charter can only be repealed or amended by following the provisions of the amending formula, outlined in section 38 of the Charter, or by use of section 33, which is commonly known as the "override" provision.

The existence of this power means that a government which wishes to enact a limit to a guaranteed right or freedom has the power to do so. It is presumed that it would only rarely be invoked, as it would no doubt attract a great deal of opposition. There is also a "sunset

clause" provision on the override power, which makes the declaration expire automatically after five years. This forces reconsideration of each exercise of the override power at intervals of five years.

Section 52 of the Constitution Act provides that the Constitution of Canada is the supreme law of Canada, and that any law inconsistent with it is to that extent of no force or effect. The Charter also contains a precise remedy section, which reads as follows:

> 24(1) Anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The independence of Canada's judiciary; the constitutional supremacy of the rights and freedoms set forth in the Charter; and the specific provision on remedies for their infringement, ensure that human rights values have been given effective and overriding force in Canada, in relation to all actions of the State authorities that might impinge upon them.

III. HUMAN RIGHTS LEGISLATION IN CANADA

Individual Rights and the Rights of the Community

Freedom requires a reasonable balance between the rights of the individual and the rights of society. If there is not freedom for the community to develop in harmony and peace, there cannot be secure freedom for the individual who lives within it.

Human rights legislation, as an enunciation of public policy, modifies individual freedom in light of the rights of the community. Freedom of speech, to use as an example, does not include the right to shout "Fire!" in a crowded theatre, when there is no fire. The right of a businessman to refuse to hire divorced people, or members of a visible minority group, is limited by a public policy which states that everyone shall have an equal opportunity to work. The purpose of human rights legislation is to ensure that attention is focussed on an individual's ability and merit, and not on colour or class.

Human rights legislation attempts to mark out a shared standard of community consensus. It becomes public policy, and anyone who flouts it will find the collision point between his individual rights and the rights of society. If an individual fails to respect these standards, the act does not merely give rise to a private claim for compensation -- it amounts to a public wrong. But human rights legislation is concerned less with punishment than with attempting to convince the offender to agree to meet the community consensus. Consequently, it is conciliatory in its thrust, the usual remedy for contravention being rectification of the offending situation.

Legislation on human rights can and should perform several functions then, in relation to community consensus. It should sum up and declare public policy, officially and unequivocably. It should provide legal redress for individuals and groups whose rights are being over-ridden. It should create peaceful means for resolving inter-group tensions.

Human rights legislation should in itself be an expression of the decent values of its community, and provide support by example and by law for better public understanding and respect for these values.

The argument or objection some people may raise, saying that morality can't be legislated, isn't relevant because the attempt is not to legislate morality. The attempt is to prohibit discriminatory acts which deprive others of their individual rights.

In an article written in 1968 Professor Walter Tarnopolsky provided a compelling articulation of the fundamental importance of human rights legislation:

> Anyone can live without voting, but it is extremely difficult to live without a job or without decent accommodation that most seriously affects a person's dignity, self respect and ability to provide for himself. That is why in the last two or three decades it has been increasingly recognized on this continent that a "shield" against the government is not sufficient, what is required is a "sword" against private individuals and groups who practise discrimination.*

The legal enforcement of human rights, the "sword", is an area of great significance to any society that calls itself a democracy.

The Human Rights Statutes

As previously noted, each of the provinces, the federal government, and the two territories have all enacted human rights legislation. The provincial Acts apply to persons in the private sector and also to individuals in the provincial public sectors. The federal Act applies to persons in the federal public sector, and also to persons engaged in activities coming within federal jurisdiction. Importantly, as

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* Keene, Judith, "Human Rights in Ontario", The Carswell Company Limited, 1983, p. v.

adequate legislation is not in place in Yukon, the federal Act also currently applies to the territorial public sector.

It should be noted here that the international human rights treaties discussed in the first section, apply to States rather than directly to individuals, although they include requirements that States Parties enact legislation to protect individuals against discrimination. It should also be noted that the equality provisions in the Charter as previously discussed, are a constitutional limitation on the power of the State to discriminate against its citizens. It is recognized, however, that discrimination is most commonly practiced by individuals (private citizens) and in this respect the federal, provincial and territorial human rights Codes and Acts will continue in force.

In a very general sense, discrimination occurs when a determination is made not on the basis of an individual's merit, but rather on the basis of his or her identification with a certain category of persons. It is these 'categories' or "classes" of persons which form the proscribed (that which is prohibited) grounds of discrimination in human rights legislation.

In a recent study paper prepared by the Department of the Secretary of State Canada, the author provides examples of "traditional" and "new" proscribed grounds of discrimination in Canada:*

> "Human rights codes declare that in matters relating to employment practices, accommodation, facilities, goods, services, and notices, that discrimination against any person is prohibited. The Codes then detail the "grounds" or "classes" upon which the prohibition is centered and generally include such grounds as race, colour, religion or creed, sex, age, (except Yukon) marital status, ancestry or national or ethnic origin, which exist in all jurisdictions in Canada. Physical handicap/disability is included in this category because despite its relatively recent introduction in human rights legislation it is included as a proscribed

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* Report on New Proscribed Grounds of Discrimination and Emerging Human Rights in Canada, Department of the Secretary of State, Ottawa, Canada, September, 1983, p.4.

ground in all jurisdictions (except Yukon). These, then, are what are referred to as the rather traditional, proscribed (that which is proclaimed as being prohibited) grounds of discrimination.

"New" proscribed grounds of discrimination are distinguished from the traditional grounds in that these "new" proscribed grounds, while having been captured satutorily in at least one jurisdiction, or maybe more, have not been universally accepted throughout Canada. These grounds of discrimination may have evolved from precedent-setting court challenges, extensive lobby efforts by some groups, or have followed from the recommendations of a regional Human Rights Commission. This latter group includes the following grounds: sexual orientation (Quebec); economic status e.g. assignment, attachment of seizure of pay (Newfoundland); receipt of public assistance (Ontario); source of income (Manitoba); social condition (Quebec); political opinion/belief; family status; criminal record; pardoned offence; place of residence; mental handicap; and language".

The "new" proscribed grounds of discrimination will be discussed in detail in the next section. Two charts,* outlining the prohibited grounds of discrimination in employment and provision of public services and facilities are included here for a quick review of the different Human Rights Acts.

The Fair Practices Act

The Fair Practices Act, 1963, is our current human rights legislation in Yukon. It applies to all Yukoners, with the exceptions of those employers and organizations under federal jurisdiction, as is the case in all the provinces, and the Government of Yukon, as the legislation does not bind the Crown. Currently the government of Yukon is bound by the wider provisions of the Canadian Human Rights Act. However, at such time as new legislation is in place in Yukon, the Federal Government will proclaim amendments releasing the Government of Yukon from its jurisdiction.

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* Canadian Human Rights Commission, January, 1985

Prohibited grounds of discrimination in employment

Jurisdiction	Federal	British Columbia	Alberta	Saskatchewan	Manitoba	Ontario	Quebec	New Brunswick	Prince Edward Island	Nova Scotia	Newfoundland	Northwest Territories	Yukon
Race	●	●	●	●	●	●	●	●	●	●	●	●	●
National or ethnic origin[1]	●				●	●	●	●	●	●	●		●
Ancestry		●	●	●		●		●				●	●
Nationality or citizenship				●	●	●						●	
Place of origin		●	●	●		●		●				●	
Colour	●	●	●	●	●	●	●	●	●	●	●	●	●
Religion	●	●		●	●		●	●	●	●	●		●
Creed[2]			●	●		●			●	●	●	●	●
Age	●	● (45-65)	● (45-65)	● (18-65)	●	● (18-65)	●	● (19+)	● (18-65)	● (40-65)	● (18-65)	●	
Sex	●	●	●	●	●	●	●	●	●	●	●	●	●
Pregnancy or childbirth	●			●			●						
Marital status[3]	●	●	●	●	●	●	●	●	●	●	●	●	●
Family status[3]	●				●	●	●					●	
Pardoned offence	●						●					●	
Record of criminal conviction		●				●	●						
Physical handicap or disability	●	●	●	●	●	●	●	●	●	●	●	●	
Mental handicap or disability	●	●			●	●	●					●	
Dependence on alcohol or drug	●												
Place of residence												●	
Political belief		●			●		●		●		●		
Assignment, attachment or seizure of pay[4]											●		
Source of income					●								
Social condition[4]							●						
Language							●						
Social origin[4]											●		
Sexual orientation[5]							●						
Harassment[5]	●					●	●				●		

1 New Brunswick includes only "national origin".
2 Creed usually means religious beliefs.
3 Quebec uses the term "civil status"
4 In Quebec's charter, "social condition" includes assignment, attachment or seizure of pay and social origin.
5 The federal, Ontario and Quebec statutes ban harassment on all proscribed grounds. Ontario and Nova Scotia also ban sexual solicitation.

This chart is for quick reference only. For interpretation or further details, call the appropriate commission.

Prohibited grounds of discrimination when providing public services and facilities

Jurisdiction	Federal	British Columbia	Alberta	Saskatchewan	Manitoba	Ontario	Quebec	New Brunswick	Prince Edward Island	Nova Scotia	Newfoundland	Northwest Territories	Yukon
Race	●..	●	●	●	●	●	●	●	●..	●	●	●	●
National or ethnic origin	●..				●	●	●	●	●..	●	●		●
Ancestry		●	●	●		●		●				●	●
Nationality or citizenship				●	●	●						●	
Place of origin		●	●	●		●		●				●	
Colour	●..	●	●	●	●	●	●	●	●..	●	●	●	●
Religion	●..	●		●	●		●	●	●..	●	●		●
Creed[1]			●	●		●			●..	●	●	●	●
Age	●..			●	●	●	●	●	●..			●	
Sex	●..	●	●	●	●	●	●	●..	●..	●	●	●	●
Pregnancy or childbirth	●						●						
Marital status*	●..	●		●	●	●	●	●..	●..		●	●	●
Family status*	●..				●	●	●					●	
Pardoned offence	●..											●	
Physical handicap or disability	●..	●	●	●	●	●	●	●..	●..	●..	●..	●	
Mental handicap or disability	●..	●			●	●	●					●	
Dependence on alcohol or drug	●..												
Political belief							●		●..		●		
Source of income					●					●			
Social condition							●						
Language							●						
Social origin											●		
Sexual orientation							●			●			
Harassment (all grounds)	●..					●	●						

1 Creed usually means religious beliefs.
*Quebec uses the term "civil status."
** Any limitation, specification, exclusion, denial or preference may be permitted in each jurisdiction if a bona fide justification can be demonstrated.

This chart is for quick reference only. For interpretation or further details, call the appropriate commission.

January 1995

Discrimination based on the following grounds is currently prohibited in employment, accommodation, and services offered to the public: race; religion; religious creed; colour, ancestry; sex; marital status; or ethnic or national origin of any person.

These grounds could be expanded to include all or some of the additional grounds discussed in the next section: age; physical and mental disability; criminal record; sexual orientation; political belief; source of income/public assistance; pregnancy; family status; language; and discrimination without reasonable cause.

A person feeling aggrieved under the Fair Practices Act may file a complaint with a civil servant in the Labour Services Branch of the Department of Consumer and Corporate Affairs. The officer will investigate, and attempt to settle the matter. If he finds that the complaint is supported by evidence, but is unable to effect a settlement, the officer will recommend to the Commissioner-in-Executive Council the course that ought to be taken. The Commissioner-in-Executive Council must then put into effect whatever order the officer has recommended. Any person affected by such an order may, within ten days after receiving it, appeal to a judge.

This, in effect, puts all the responsibility for investigation, conciliatory attempts, and the final judgment of the case on a civil servant. It also involves the political arm of government in each complaint that cannot settled, as the Commissioner-in-Executive Council must put into effect the officer's recommendation.

This type of administration is now unique to the two territories. All other Canadian jurisdictions have established Human Rights Commissions to administer their legislation. The mandates of these Commissions are discussed in the section on Administration.

Other issues, such as affirmative action and sexual harassment, which are not included in the Fair Practices Act, are discussed in the section on Other Issues.

IV. ADDITIONAL GROUNDS OF DISCRIMINATION

This section is titled "Additional Grounds" because currently, none of them are included in Yukon's Fair Practices Act. With the exceptions of Age and Physical Disability, the remaining grounds are "new", in that while having been captured statutorily in at least one jurisdiction in Canada, they have not been universally accepted throughout the country.

The grounds of discrimination discussed in this section are:

AGE

PHYSICAL AND MENTAL DISABILITY

CRIMINAL RECORD

SEXUAL ORIENTATION

POLITICAL BELIEF

SOURCE OF INCOME/PUBLIC ASSISTANCE

PREGNANCY

FAMILY STATUS

LANGUAGE

DISCRIMINATION WITHOUT REASONABLE CAUSE

Age

Yukon is currently the only jurisdiction in Canada which does not provide protection from discrimination because of age. This lack of

legislative protection is especially conducive to discrimination in employment where persons may be rejected because an employer prefers, regardless of practical reality, an employee of a particular age group.

British Columbia was the first province, in 1964, to add "age" as a prohibited ground of discrimination. Since then, all of the other provinces, the federal government, and the Northwest Territories have included it in their human rights legislation.

Some jurisdictions have defined the age group that is protected. In British Columbia and Alberta it is 45-65 years; in Nova Scotia 40-65 years; Ontario, Saskatchewan and Prince Edward Island define it as 18-65 years; Newfoundland 19-65 years, and in New Brunswick it is over 19 years. Age is not defined in Manitoba, Quebec, the Northwest Territories or the federal legislation. Age is also not defined in section 15 of the Charter of Rights and Freedoms.

The Manitoba legislation provides for an exception with respect to employment of persons under the age of majority, as defined in other Manitoba legislation. The Canadian Human Rights Act allows exceptions because an individual has not reached the minimum age, or has reached the maximum age that applies to that employment by law or regulations.

In both jurisdictions, the determination of the exception is made not by the respective Human Rights Commission or Board of Inquiry, but by the appropriate legislative, or executive body. The Canadian Human Rights Commission has issued "Age Guidelines" which exempt "a reduction or absence of rates, fares or charges with respect to children, youths or senior citizens" from the prohibition of discrimination with respect to provision of goods, services, facilities or accommodation customarily available to the general public.

An issue receiving considerable attention with respect to age concerns the question of mandatory retirement at age 65. Complaints which have

been the subjects of litigation are those based on "bona fide occupational qualifications", and closely related are the provisions for bona fide retirement or employee benefit (such as insurance or pension) plans. As of 1982, there had been some 23 board of inquiry decisions in Canada concerning complaints based upon age, or age and some other ground.*

The Supreme Court of Canada has said that the following would need to be addressed in order to arrive at a measure of adequate evidence required to establish mandatory retirement as a bona fide occupational requirement:**

1. detailed nature of the duties to be performed
2. conditions in the workplace
3. effect of conditions on employees — especially those near retirement age.

McIntyre J. went on to say:

> ". . . a mandatory retirement at a fixed age must be imposed honestly, in good faith, and in the "sincerely held belief that such limitation is imposed in the interests of adequate performance of the work involved . . . ."

The employer may, therefore, impose a mandatory retirement age when, as McIntyre J. said:

> ". . . there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interest of safety of the employee, his fellow employees, and the public at large."

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* For details of these cases, refer to W. Tarnopolsky, Discrimination And The Law, 1982, p.238.

** Secretary of State, New Proscribed Grounds of Discrimination and Emerging Human Rights in Canada, 1983, p.63.

Where it is shown that the only factor taken into account in compelling a person to leave his employment was age, this raises a "prima facie" case of age discrimination. This, in turn, shifts the onus on to the employer, to show that the retirement was based on a reasonable occupational qualification.

It appears that eliminating mandatory retirement has an increasing public acceptance and legitimacy across Canada. By way of summary, the following highlight these trends:*

- A majority of leading jurists suggest that the Canadian Charter of Rights and Freedoms, article 15, which prohibits discrimination under the law, and with equal benefit of the law, on the basis of age will make mandatory retirement unconstitutional.

- Organized labour has mixed reactions -- however, the Canadian Union of Public Employees (CUPE), the nation's largest union, strongly endorsed the abolition of mandatory retirement at its 1977 national convention.

- The Treasury Board of Canada in its report Mandatory Retirement Age in the Public Service (June 1981) concluded that the public service was receptive to a removal of or change in mandatory retirement, and has urged a policy change in this direction.

- Canadian Special Senate Committee on Retirement Age Policies: Retirement Without Tears. The report recommends the progressive abolition of mandatory retirement in the federal public service and for federally chartered corporations. It further recommends that a policy of flexible retirement become the standard for public and private enterprises.

- In the United States amendments to the Age Discrimination in Employment Act raised the protected age limit from 65 to 70 (effective January 1, 1979), and abolished mandatory retirement for most federal government employees (effective September 30, 1978).

- The Economic Council of Canada report, One in Three calls for policies to allow for later retirement.

- Quebec abolished mandatory retirement in the province in 1982.

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* Ibid., p.105-107

- Two provinces have "open-ended" definitions of age in their human rights legislation. (Manitoba, New Brunswick).

Elimination of mandatory retirement does not, however, necessarily mean wholesale accompanying changes in pension plans and related policies. An employer could still retain a standard age at which employees may retire at full pension although nothing should preclude employees from continuing to work if they wish to do so. However, if people continue to work beyond age 65, they could legitimately be excluded from participating in the pension plan (i.e. they would no longer contribute or earn pension credits) and would not draw pension until they stopped working.

Handicap/Disability

The International Year of Disabled Persons, 1981, raised the consciousness of many Canadians. In June of that year, a public opinion poll indicated that 92% of Canadians believed that the Constitution should protect mentally and physically handicapped persons.

The Canadian Charter of Rights and Freedoms prohibits discrimination on grounds of "mental or physical disability", and this provision in section 15 will come into effect in Canada in April of 1985.

All provinces (except British Columbia) already include physical handicap as a proscribed ground of discrimination, but so far only Quebec, Ontario, Manitoba, the Northwest Territories and the federal legislation include both physical and mental handicap provisions.

All jurisdictions provide for a "bona fide occupational qualification" exemption with respect to employment. Bona fide occupational qualifications are the factors used in determining whether or not a person is capable of fulfilling the job requirements. A disable person then, may not be refused a job simply because he is disabled. The criterion will have to be his ability to perform the job.

Each human rights statute provides its own definition of disability, or handicap. The Saskatchewan Human Rights Code provides one of the most recent examples of a definition of the term "physical disability":

> "physical disability" means any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device.

In considering the adjudications in this area, it should be noted that these relate only to physical "disability" or "handicap" and these are few in number because of the very short period of time that these grounds have been included in human rights legislation. The issues with respect to this ground, as far as adjudication is concerned, have not to date been so much concerned with definitions and scope as they have been with respect to the "b.f.o.q." (bona fide occupational qualfication) exemptions, and what adjustment or compensation should be required of the respondent.

In Saskatchewan there is a definition of undue hardship in the regulations but this is the extent of the legislative enactments on this subject in Canada. Litigation has been sparse, however one case in Saskatchewan on this subject is rather important.*

In the Canadian Odeon Theatres Ltd. v. Michael Huck case the complainant Huck had a condition confining him to a wheelchair. A board of inquiry found that Huck had been discriminated against (by the movie theatre) because of his physical disability. He was only able to be seated in front of the front row of seats. The case was appealed to the Court of Queen's Bench. Here the issue was whether or not the theatre was under

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* Ibid., p.51(b).

a legal obligation to accommodate the complainant in a more reasonable location.

Section 39 of the Saskatchewan Human Rights Code says where a complaint of discrimination is found the board of inquiry

> "Shall, by order, . . . include any recommendations that it considers to be appropriate (but an order may not be made where) the costs . . . would constitute undue hardship."

Paragraph 36 of the regulations states:

> "Where an application for exemption . . . is made to the Commission and where it is established to the satisfaction of the Commission that the cost or business inconvenience that would be occasioned in the provision of amenities or physical access for the physically disabled would constitute, in the opinion of the Commission, undue hardship, the Commission may exempt the applicant from the provisions of the said section 11 or section 12."

The Court ruled in favour of the theatre, stating that the Code only requires those who provide services to offer the same facilities to disabled persons as are offered to other members of the public. The court said:

> "All Section 12(1)(b) requires is that the physically disabled be offered the same facilities as are offered to the public. No more and no less."

This case indicates the courts discomfort to utilize the concepts of "reasonable accommodation" and "undue hardship" unless they are specifically and categorically provided for in the legislation in the clearest language.

The Court obviously felt constrained by the words of the statute when it declared: "Redress lies with the legislature not the courts."

The Human Rights Commission appealed, and the Saskatchewan Court of Appeal reversed the trial court's decision on March 4, 1985.

For an in-depth study of the many issues involved in handicapped/ disabled persons rights, reference should be made to the reports cited below:

1. Report of the Special Committee on the Disabled and Handicapped Obstacles 1981.
2. Obstacles, June 1982 Progress Report.
3. Obstacles, December 1981, Native Population, Follow-up Report.
4. Surmounting Obstacles, Third Report, June 1983.

Criminal Record

More than 1.7 million Canadians have criminal records -- one Canadian male in five, over the age of 15 has problems with a criminal record, usually a minor one. In Yukon, it is possible at present to legally discriminate against a person in employment matters because of his or her criminal record, without regard to the nature of the crime, to its severity, to whether or not it was a repeated offence, or to the age of the person at the time it was committed.

The basis of this proscribed ground is that it is in the best interest of society to rehabilitate, to reintegrate the person who has been convicted of a crime back into a useful and productive life. It is also based on a concept of justice; once a person has completed a sentence, he/she should not be punished again for the same crime.

Inclusion of "criminal record" as a prohibited ground of discrimination in human rights legislation directs employers to consider the nature of

the conviction and the nature of the job, and make a practical decision as to whether the conviction is related to the performance of that particular job. This means, for example, that a conviction for armed robbery would be grounds for refusing employment as an armoured car driver, but not grounds for refusing employment as a bus driver; that a conviction for embezzlement would be grounds for refusing employment as a bank teller, but not grounds for refusing employment as a construction worker.

The Canadian Human Rights Act and the Fair Practices Ordinance of the Northwest Territories include as a proscribed ground of discrimination: "Conviction for which a pardon has been granted". The protection is tempered by the limiting term "pardoned", which may be one of the reasons why, in 1980, only one percent of all cases handled by the federal Commission included pardoned convictions. About 30,000 pardons have been issued under the Criminal Records Act since 1970, but the process itself is a cumbersome one.

The Ontario and British Columbia Human Rights Codes provide for "record of offences" and "conviction of criminal and summary convictions charges" respectively. The ambit of protection offered in these two Codes is far wider than that offered by the federal legislation, in that the record of offences need not be pardoned so as to qualify for protection from discrimination.

The Quebec Charter was recently amended to provide that:

> "No one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he pleaded guilty to a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence."

There is no desire to deny the right of employers to know the background of employees or of job applicants, in ordr to determine their suitability for a particular position, particularly when that

position is a sensitive and responsible one. However, this background should be assessed fairly in terms of the individual's overall record and current ability to perform the job. Disclosure and discussion may be limited to interviews rather than application forms to eliminate unfair or prejudicial use of the information.

A bona fide employment qualification is considered when, in fact, the criminal conviction does relate to the occupation or employment, or to the intended occupation or employment of a person.

Sexual Orientation

Quebec is the only Canadian jurisdiction which includes "sexual orientation", specifically, as a prohibited ground of discrimination in their human rights legislation. This was added in 1977 to the Quebec Charter. The Quebec Human Rights Commission has taken the following approach to the topic of "sexual orientation":

> "Sexual orientation has been interpreted as including all tendencies or directions taken by one's sexuality including the behaviour generated by the tendency. Consequently, heterosexuality, homosexuality, bisexuality and transsexuality are all covered by the expression. The aim . . . is not to promote any specific sexual orientation but to protect individuals in their intimate adult lives."*

The prohibition of discrimination "without reasonable cause" included in the Manitoba and British Columbia legislation may form the basis of some protection from discrimination based upon "sexual orientation".

Case law on this issue has been definite in stating that the ground of "sex" in human rights legislation refers to gender, and not to practice or preference. However, this may all change in 1985 with the

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* J. Bergeron, "New Categories in Quebec Analyzed" (1980) Canadian Human Rights Reporter, Volume I p.17, 18.

enforcement of section 15 (the equality rights) in the Charter of Rights and Freedoms.

Obviously this issue will have to be settled judicially, but in the meantime, several people have suggested that the Courts might interpret section 15 as possibly protecting persons against discrimination on the basis of sexual orientation.*

Sexual orientation is an issue receiving widespread attention from a wide range of groups and from the federal, Saskatchewan, Ontario and British Columbia Human Rights Commissions. Several municipalities have banned discrimination on this ground in hiring. The Cities of Toronto, Ottawa, Windsor and Kitchener have banned discrimination in municipal hiring, and the City of Vancouver has approved amendments which ban discrimination in employment, municipal legislation and the provision of civic services on the basis of sexual orientation.

If the provinces of Manitoba and British Columbia, with their "without reasonable cause" provisions are included, legislators governing forty-seven percent of the Canadian population have passed legislation to indicate their consensus that some form of human rights protection is warranted on the basis of sexual orientation.

As stated by the Quebec Human Rights Commission, the inclusion of sexual orientation as a proscribed ground does not denote social approval by a province of a particular set of values or lifestyle in any manner different than that the protection of people on the basis of religion denotes a provinces approval of any particular religious group.

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* For example, Justice Minister MacGuigan in 'Minutes of Proceedings and Evidence on the Standing Committee on Justice and Legal Affairs' Issue No. 114 p.20, December 20, 1982; Gordon Fairweather of the Canadian Human Rights Commission — Citizen interview October 5, 1982; D. Martin Low, Counsel Human Rights Section, Department of Justice, Toronto Star interview, September 19, 1982.

Although moral or religious convictions about sexual orientation, homosexuality in particular, are relevant to the private lives of individuals, orientation is considered by many to be irrelevant to job performance or access to services.

As things now stand in Yukon legislation, a homosexual can legally be denied public services, refused a job, fired, or evicted from housing accommodation on grounds of his homosexuality alone.

Political Opinion

In 1764, Voltarie wrote in Philosophy Dictionary: "It is clear that every private individual who persecutes a man, his brother, because he is not of the same opinion, is a monster."*

Today, the Charter of Rights and Freedoms, in section 2, states that "Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression . . . (d) freedom of association." If people are discriminated against because of their beliefs or because of the ideology of those people with whom they associate, then these freedoms are curtailed.

This class also exists under the terms of the International Covenants. The summary records of the Canadian presentation of our Report on the Covenant to the UN Human Rights Committee notes that the Committee questioned why it was that political opinion was not included as a prohibited ground of discrimination in anti-discimination legislation across Canada.

In 1969, Newfoundland became the first province to include "political opinion" as a prohibited ground of discrimination under its Human

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* Secretary of State, "New Proscribed Grounds of Discrimination and Emerging Human Rights in Canada", September 1983, p.86.

Rights Act. British Columbia, Manitoba, Prince Edward Island and Quebec have also included "political belief/conviction" as a prohibited ground of discrimination.

In the case of Newfoundland, Prince Edward Island and Quebec this is a prohibited ground with respect to all activities covered by the legislation, although Newfoundland makes a specific provision that it can be a bona fide occupational qualification in employment, job advertisements, and applications. Prince Edward Island provides that it can be a bona fide occupational qualification for non-profit groups. In Manitoba and British Columbia, "political belief" is a prohibited ground only with respect to employment, although Manitoba provides that it can be a bona fide occupational qualification, while British Columbia provides that it can be shown to be a reasonable cause.

Prince Edward Island is the only jurisdiction to provide any definition of "political belief" in its statute, and states that it shall be "political belief as registered under section 24 of the Elections Act."

Source of Income/Public Assistance

"Source of income" is a protected class for those in "receipt of public assistance" in Ontario in matters of accommodation. "Social condition" is a prohibited ground of discrimination in all matters in Quebec, though it can be a bona fide occupational qualification as it relates to employment and job advertising. Newfoundland employs the term "social origin" and in Manitoba the Act speaks of "source of income".

Discrimination because of economic status most seriously affects women (especially single parents), natives and handicapped persons, welfare recipients, unemployed persons, and the working poor, in the areas of access to goods and services or facilities. The most obvious example is the refusal by landlords to rent accommodations to welfare recipients even when they can afford the rent.

Without such an inclusion of the ground "economic status" or "source of income" in human rights legislation, it remains possible to discriminate against persons, not because of their race or handicap, but because they are "poor", or in receipt of public assistance.

Pregnancy

While most proponents of human rights believed that childbirth and pregnancy were implicitly covered in all human rights codes, the Canadian Supreme Court decision in the Bliss* case suggests that this may not be the case. In light of this decision, legislative amendments to the definition of "sex" have appeared to be in order to remove any doubt. In recent amendments to the Canadian Human Rights Act, it is now proclaimed that:

> "Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex".

Alberta and Saskatchewan have also made specific provision that restrictions or conditions relating to "pregnancy" constitute discrimination on the ground of sex. Quebec also has specifically enumerated "pregnancy" as an independent ground in recent amendments to their legislation.

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* Bliss v. Attorney General for Canada (1979). In this case the Supreme Court of Canada denied leave to appeal from the decision of the Federal Court of Appeal. Stella Bliss was seeking benefits pursuant to the Unemployment Insurance Act. The problem was that Blis worked long enough to qualify for ordinary benefits (i.e. 8 weeks) but not long enough to qualify for pregnancy benefits (i.e. 10 weeks). The Federal Court of Appeal (Pratt J.) held: "Section 46 applies to pregnant women, it has no application to women who are not pregnant, and it has no application, of course, to men. If Section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women".

Family Status, Marital Status, Civil Status

All Canadian jurisdictions prohibit discrimination because of "marital status" or "family status" or "civil status". They all prohibit discrimination on one of the above-mentioned grounds with respect to employment, and also provide for a bona fide occupational qualification exemption.

Saskatchewan is the only jurisdiction to define "marital status"; it does so in its Regulations:

> "Marital status" means that state of being engaged to be married, married, single, separated, divorced, widowed, or living in a common-law relationship, but discrimination on the basis of a relationship with a particular person is not discrimination on the basis of marital status."

Manitoba does not define "marital status", but provides a definition of "family status":

> "Family status" for the purpose of this Act includes the status of an unmarried person or parent, a widow or a widower, or that of a person who is divorced or separated or the status of the children, dependents, or members of the family of a person."

Quebec does not define their term, "civil status", nor does the Canadian Human Rights Act define the terms used, i.e., "marital status" and "family status". Yukon uses the term "marital status", and does not define it.

It can be seen that the term "marital status" confined as it is to the spousal relationship and to issues concerning whether or not one is married, is much narrower than the term "family status", which includes many relationships beyond the spousal, and the fact of being married or not.

Language

Section 10 of the Quebec Charter is the only human rights protection in Canada to provide protection against discrimination on the basis of "language". There are, however, no reported cases to provide guidance as to how this ground might be interpreted and applied. Language discrimination may be treated as discrimination on the basis of ethnic or ancestry factors in other jurisdictions.

This is also a class that is referred to in the International Covenants.

Some steps have been taken by the federal and provincial governments to protect the right of the two "official languages" in Canada. However, there has been little movement outside Quebec to add language as a prohibited ground in anti-discrimination legislation. In light of recent government initiatives in Manitoba, Yukon and Northwest Territories, it should be kept in mind that the issues of official bilingualism and language discrimination are separate and distinct.

Discrimination Without Reasonable Cause

The list of prohibited grounds of discrimination in Canada has grown considerably since the first statutes were enacted after the Second World War. The changes reflect the fact that public attitudes towards certain types of discrimination once tolerated, are now considered unacceptable.

Although new grounds have been added over the years in order to conform to changing public expectations, the legislation has often been criticized as outmoded almost before it has been proclaimed.

The clause known as "without reasonable cause" provides legislation with enough flexibility to cover additional prohibited grounds as they

arise, as envisioned by the language of the Charter. Section 15 states that "every individual is equal . . . without discrimination, and in particular, without discrimination based on race, etc.". The federal government booklet, A Guide for Canadians says at page 16, regarding section 15:

> "This will enable the Courts to develop new grounds of non-discrimination when the distinctions drawn are considered unacceptable."

The previously mentioned International Covenant on Civil and Political Rights, enumerates the rights belonging to all individuals. The language used in two sections indicates that the proscribed grounds listed are illustrative only and, in fact, the list is open-ended:

> Article 26: "protection against discrimination on any ground such as race, colour, sex, language, religion . . ."
>
> Article 2: "without distinction of any kind, such as race, colour . . ." (emphasis added).

The two provinces which have utilized this clause, thereby dramatically extending the scope of the legislation, are British Columbia and Manitoba. It should be noted here that on July 7, 1983, legislation was introduced in British Columbia (Bill 27), which would replace their existing Human Rights Code. The proposed Act would eliminate the "reasonable cause" provision from the legislation, and prohibit only the grounds of discrimination specifically named in the Bill.

However, in order to fully conform to the requirements established by the Covenant and the Charter, it may be that Canadian human rights statutes will also have to be "open-minded".

Some have argued that a "without reasonable cause" provision effectively results in the abdication of legislative responsibility. Ian Hunter writes in Western Ontario Law Review "Human Rights Legislation in Canada":

> "the effect of this dangerously open-ended section is to make the Human Rights Commission, rather than the employer or even the statute, the arbitrator of what qualities may be reasonably sought in the hiring process . . . it also betrays a disturbing insensitivity to the particular rights of an employee, and to the generalized right of a free citizenry against arbitrary, ex-post facto law-making by unelected public authorities."

Another criticism of the "reasonable cause" clause is that the words themselves do not sufficiently explain to the public, the extent of their obligations under the law.

V. ADMINISTRATION AND ENFORCEMENT

The Human Rights Commissions

Yukon and the Northwest Territories are the only Canadian jurisdictions without a Human Rights Commission. The administration of human rights legislation in Yukon is discussed on pages 14 and 17.

By 1975 every province had a Human Rights Commission charged with the administration of human rights legislation, and in 1977, with the enactment of the Canadian Human Rights Acts, a Commission came into being at the federal level as well.

The mechanism of enforcing the Human Rights Acts in Canada then, is through Human Rights Commissions and Boards of Inquiry, rather than directly through the courts. This is intended to facilitate the process of resolving complaints by conciliation, and by lessening the expense and formality of the procedure, at least by comparison with the courts. To ensure the fullest measure of legal safeguards however, on points of law an appeal can be made from the decisions of Boards of Inquiry, to the courts.

An individual may file a complaint with the relevant Commission, which will investigate it and attempt to conciliation, provided however that a Commission may dismiss complaints that it considers frivolous, vexatious, or without evidence. If necessary, a Board of Inquiry will be appointed to determine the validity and judgment of the complaint. These Boards of Inquiry are often comprised of legal scholars who are active in the human rights area, and a rich jurisprudence is being developed by them in issues pertaining to human rights. Since 1980 there has been a national reporting system (The Canadian Human Rights Reporter) in regard to the decisions of human rights Boards of Inquiry, and the resulting ready accessibility of these decisions is proving to be a significant factor in the evolution of human rights in Canada.

Most Commissions are accountable to a government Minister, in the form of reporting directly to him/her. Exceptions exist in Quebec, where the Commission reports annually and directly to the President of the National Assembly, and in the federal Commission, which reports to Parliament through the Minister of Justice.

1. The Mandate

Generally, the different human rights statutes mandate the Commissions to carry out two functions: (1) administration and enforcement of the Act; and (2) research and education. Because the Saskatchewan Human Rights Code provides the most detailed mandate (in section 25), it is used as an example: The Commission shall:

(a) forward the principle that every person is free and equal in dignity and rights without regard to his race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin;

(b) promote an understanding and acceptance of, and compliance with this Act;

(c) develop and conduct educational programs designed to eliminate discriminatory practices related to the race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin of any person or class of persons;

(d) disseminate information and promote understanding of the legal rights of residents of the province and conduct educational programs in that respect;

(e) further the principle of the equality of opportunities for persons, and equality in the exercise of the legal rights of persons, regardless of their status;

(f) conduct and encourage research by persons and associations actively engaged in the field of promoting human rights;

(g) forward the principle that cultural diversity is a basic human right and fundamental human value."

Apart from the formally designated educational programs, most Commissioners and Commission staff members are engaged in education of an informational and promotional nature through speeches, press conferences and releases, interviews and seminars.

2. The Commissioners and Commission Staff

With the exception of the Quebec Commission, all provincial human rights commissioners are appointed by the Lieutenant-Governor in Council. Quebec commissioners are appointed directly by the National Assembly. Appointment of the federal commissioners is comparable to that of the provinces, although they are given tenure, in that each member holds office during good behaviour, but may be removed at any time by the Governor in Council on address of the Senate and House of Commons.

Generally, the position of a human rights commissioner is a part-time position. There is no uniform term of office for a commissioner. Saskatchewan is the only province which specifies a fixed term (five years). The other provinces either do not specify a term or set out maximum terms.

Newfoundland, Nova Scotia, New Brunswick, Ontario and Saskatchewan provide that there should be three or more members. Quebec provides for not less than seven Commissioners. Prince Edward Island and Newfoundland each have three human rights commissioners, and all the other provinces and the federal commission have between seven and eleven.

In the federal and Quebec Commissions, it is the Chief Commissioner who acts as the chief executive officer. In all the other jurisdictions, this executive function is fulfilled by a Director of Human Rights. Nearly all of the Commissions are

staffed by public servants. The exceptions are Quebec and Saskatchewan; however in Saskatchewan while the employees are hired directly by the Commission, and not in accordance with the Public Service Act, they are members of a C.U.P.E. Local, and a section of Human Rights Act provides that the Public Service Superannuation Act applies to them.

The Canadian Human Rights Commission is the largest in terms of numbers of staff, followed by Quebec and Ontario. The smallest Commission is that of Prince Edward Island which has a Director, (who handles all of the investigation, conciliation, etc. himself) employed on a part-time basis. There is also a full-time secretary. Newfoundland's Commission has a full-time Director and a secretary.

3. Investigations and Boards of Inquiry

Once a complaint is filed with a Human Rights Commission, the Commission will inquire into it and endeavour to effect a settlement of the matter. The vast majority of complaints in Canada have been settled in this way, between the parties, with only a small percentage ever reaching the Board of Inquiry stage.

Where a settlement is agreed to in writing, signed by the parties, and approved by the Commission, the settlement is binding upon the parties. If the Commission is of the opinion that a party to the settlement has failed substantially to comply with the terms of the settlement, it may re-open the proceedings, as if no settlement had been reached.

However, in any case where the Commission fails to reach a settlement, and believes that the evidence warrants an inquiry, it may recommend that a Board of Inquiry be appointed to decide the matter.

The responsibility to appoint a Board generally rests with the Minister responsible for Human Rights. The only exceptions are with the federal commission, which appoints its Boards, and Quebec, where the Board process does not exist (resort there is to courts).

In Alberta, Ontario and Saskatchewan, the Minister is obliged to appoint a Board, once the commission has determined the necessity. In all other cases the Minister has discretion, and may or may not appoint a Board.

Boards of Inquiry or Tribunals derive their authority specifically from the Act. Although the exact powers differ from jurisdiction to jurisdiction, such boards are generally empowered to obtain and receive evidence, hold hearings, and make orders. Orders are normally made for rectification where discrimination has been found to occur (on the balance of evidence) and often for compensation to the victim. Compensation awards have generally been quite conservative, covering direct losses but not providing large settlements for hurt feelings or self-respect. The appropriate authority to be extended to and exercised by boards in this area is at best an unsettled issue.

4. Administrative Issues

Two administrative issues have been receiving legislative acceptability and public recognition. They are (1) the independence of the Human Rights Commissions, and (2) the primacy of the legislation. These issues have been examined by, and have resulted in reports by various Law Reform Commissions and Human Rights Commissions.

Independence of Commissions

In his book, "Discrimination and the Law in Canada" (1982), Walter Tarnopolsky argues (p. 434):

> "Without the security and independence which is provided for in the Quebec and federal Acts, through appointment during good behaviour subject only to a removal process involving the legislative body, there is less than full confidence that human rights commissions will enforce their codes as vigorously against their own governments as against the private sector."

This view was adopted in a resolution by all Canadian Statutory Human Rights Agencies (CASHRA) in 1982 which called for:

1. the separation of agencies from government departments;
2. appointment of fixed terms;
3. reporting directly to Parliament and legislatures through the Speakers.

Such views are expected however, from those administering the legislation. Others have argued that unfettered independence detracts from government responsibility, and may lead to excessive or overly zealous pursuits as well as serious financial conflicts.

Primacy/Paramountcy of Human Rights Legislation

Human rights legislation in five jurisdiction (Alberta, Prince Edward Island, Quebec, Saskatchewan and Ontario) has primacy over provisions contained in other conflicting Acts.

> "This primacy clause would give clear, overriding direction that in any case of doubt, the interpretation which treats people in a non-discriminatory way is the proper one." (Obstacles, p.21).

In all other jurisdictions, conflicts between legislative provisions in different Acts have been resolved by reference to canons of statutory interpretation. This is to say that a later statute overrides an earlier statute, except where the later one is of a general nature and the earlier one is specific, than to the extent of the repugnancy, the general Act is inoperative.

As a result, Human Rights Commissions in the other jurisdictions cannot deal with discriminatory practices in a number of areas, because these practices are allowed, even prescribed, by other pieces of legislation.

The Quebec, Nova Scotia, Prince Edward Island and Canadian Commissions have mandates to make an analysis of any statutes that may be inconsistent with the human rights legislation, and to make appropriate recommendations to Government.

Where human rights legislation is not given paramountcy, and the Commission is not given the screening function, there is no body with a specific mandate to watch for and forewarn about the enactment of legislation which is inconsistent.

Alternative Administration

The procedures for the administration of Human Rights legislation in the ten provinces and federal government, described in the preceeding pages, are based on the establishment and mandating of Human Rights Commissions. Yukon's present administrative procedures under the Fair Practices Act were outlined on pages 14 and 17.

There are alternative procedures to be considered:

(a) First Level of Appeal to a Director of Human Rights:

Administrative responsibilities might remain within a line

department of government. Two levels of appointment could be made. At the first level, a Human Rights officer will receive complaints and conduct investigations. Where a complaint is substantiated and the officer is unable to affect a settlement, the officer makes a recommendation. Should either party disagree with the officer's recommendation, the recommendation is appealed to the Director of Human Rights who may confirm, revoke or amend the officer's recommendation. During this review it may be desireable to allow the Director to bring the parties together and again attempt a resolution. Where the Director confirms, revokes or amends an officer's recommendation and either party disputes the Director's decision, appeal to the courts may be provided.

(b) Third Party Mediation:

Third party mediators might be identified in advance from the judiciary, clergy or the general public.

Option #1: An aggrieved party may in the first instance take a complaint directly to a third party mediator empowered to compel attendance of all parties to a mediation session. The mediator may consider the circumstances of the complaint and where the complaint is substantiated and a settlement not reached, the mediator may issue a recommendation, appealable by either party to the courts.

Option #2: An aggrieved party may in the first instance take the complaint to a Human Rights officer for investigation. Where the complaint is substantiated and a settlement is not reached, the officer will make a recommendation. Should either party disagree with the officer's recommendation, the recommendation would be appealable to a third party mediator, rather than the Director of Human Rights, and the mediator may confirm, revoke or amend the officer's recommendation. Again, final appeal to the courts may be provided.

(c) The Courts:

A further alternative is of course, the courts. Under this system complainants would simply take complaints directly to the courts for a decision.

In these and other alternatives there are many points to be considered. Some that may be readily identified are:

(a) What alternative would provide the fairest adjudication to the complainant and the respondent?
(b) Where would the greater knowledge and expertise in Human Rights matters be found on a continual basis?
(c) What would be the most speedy method of resolution?
(d) What would be the most inexpensive method of resolution?
(e) What would be the most acceptable method to Yukon?

VI. OTHER ISSUES

Sexual Harassment

It has only been since the mid 1970's in the United States, and the early 1980's in Canada, that women have started to bring action under anti-discrimination statutes, alleging that sexual harassment amounts to discrimination based on sex.

There is some opinion to the effect that sexual harassment may be included in the generic term "sex", and indeed some Human Rights Commissions have used the prohibition to deal with cases of sexual harassment. While tribunals and boards of inquiry have generally upheld the view that sexual harassment can be dealt with by a commission according to the provision of "discrimination on the basis of sex", there are those who feel that the legislation must provide specific protection against sexual harassment. Such legislation would serve to increase the awareness that the protection exists, encourage employers to be vigilant in guarding against sexual harassment by their personnel, and assure that when the issue arises, commissions or courts would have no choice but to adjudicate.

On June 15, 1982, when the new Ontario Human Rights Code came into force, Ontario became the first Canadian jurisdiction to categorically state that sexual harassment in matters of accommodation or in the workplace was prohibited. The Ontario Human Rights Commission has indicated that sexual harassment represents the fastest growing area of complaint in their case load, and represents ten percent of the resolved complaints.

The Ontario Code defines harassment as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome".

On December 18, 1982, Quebec also specified that sexual harassment was prohibited conduct.

Amendments to the Canadian Human Rights Act, in the Spring of 1983, also provided that harassment, on any prohibited ground, and specifically, sexual harassment, is a discriminatory practice.

The Yukon Fair Practices Act, while prohibiting discrimination on the basis of sex, does not specifically prohibit sexual harassment, or harassment on any other ground. We have, however, taken the position that harassment is included in the ground of "sex", and have received, investigated, and settled a case on this basis.

Discriminatory Intent vs. Effect

The concept of discrimination in North America has followed three stages in the evolution of recognizing discriminatory behaviour. Initially, legislators who passed laws making it illegal to discriminate in employment matters did so because they perceived the cause of discrimination stemming from racist attitudes of employers who intentionally discriminated against certain groups (i.e. minorities and women) by denying them employment opportunities. What all this meant (and still means today) is that if a Board of Inquiry found evil motive (e.g., I will not hire you -- you are black and I don't want any blacks working for me), it was an easy task to determine that discrimination had occurred. This is not to say, however, that if you don't possess an evil motive, you are not discriminating. Professor Ian Hunter reviewed this aspect of evidentiary proof in his article "Human Rights Legislation in Canada" in the Western Ontario Law Review and concluded (page 33):

> ". . . the motive for discriminatory treatment, whether occasioned by economic or social considerations and whether those considerations are soundly or fallaciously based is irrelevent, except possibly in mitigation of the penalty."

In the next stage, discrimination is seen as a practice, where an individual treats other individuals (males vs. females; blacks vs. whites) in similar situations, differently. For example, an employer may enforce certain regulations more stringently for members of a particular racial, ethnic group, then he does for members of the majority class. This is unequal, or differential treatment, and is considered discriminatory.

Both of these stages failed to tackle the larger issue of redressing historical wrongs suffered by large groups of persons. Legislators began to see that discrimination could occur in quite subtle forms. The basis for the most recent trend by the courts in discrimination analysis stems from the previous category's notion that "equality of treatment" does not necessarily mean that a discriminatory practice is not taking place. Indeed, equal treatment can lead to inequality. This third stage, then, moves away from focussing on the individual's motives or on un-equal treatment and instead human rights commissions and the courts consider the impact or consequences or effect of treatment.* In other words, the common law has recognized that an employment strategy, or an accommodation policy, can have a discriminatory impact on a given group, even though there was never an intent to discriminate. This third stage is called "systemic discrimination".

It was the landmark United States Supreme Court decision in Griggs v. Duke Power Co. in 1971 which established that, absent intent, certain employment practices could nevertheless be considered discriminatory. The principles enunciated in Griggs have been accepted to varying degrees in Canada. The leading judicial decision on the issue of intent comes from the Alberta Supreme Court in the Re Attorney General for Alberta and Gares, 1976. Mr. Justice MacDonald said:

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* Secretary of State, "New Proscribed Grounds of Discrimination and Emerging Human Rights in Canada", September, 1983, p.23.

"It is the discriminatory result which is prohibited and not a discriminatory intent."

However, the status of systemic discrimination in Canada has been thrown in a state of confusion by the recent Ontario Court case, Ontario Human Rights Commission et al. (O'Malley) v. Simpson-Sears Ltd. (1982). The Court of Appeal rejected the concept of systemic discrimination, and required intention as an essential element. The Supreme Court of Canada has granted leave to appeal, and a decision should be rendered sometime in the near future.

Ontario has since filled the vacuum relating to this issue with their new Human Rights Code, 1982, section 10, which statutorily acknowledges the concept of constructive discrimination and reverses the position of the Court in Simpson-Sears. However, what about all the other jurisdictions in Canada which don't have specific legislative wording similar to Ontario's new section 10? They have also been defining discrimination as including systemic discrimination, based on years of common law principles. This will be resolved in time with the pending Supreme Court of Canada decision.

Affirmative Action

The Yukon Fair Practices Act does not currently allow for affirmative action programs. Through the 1960's and 1970's, it has increasingly been brought to public attention that patterns of discrimination and resulting patterns of disadvantages are common to whole groups of people within Canadian society, and that these broad patterns of disadvantage are linked to race, sex, physical disability and place of origin. The patterns of disadvantage are clear and of long standing.*

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* Shelagh Day, "Affirmative Action: The Distribution of Well-Being" Canadian Human Rights Reporter, April 4, 1980.

Systemic practices in employment, which may look neutral, may have discriminatory effects. Unnecessary height and weight requirements are an example. Unnecesary educational requirements, recruitment from narrow traditional pools, and lack of facilities for both sexes are others.

Our education system of ten years ago is another example of how a system can have discriminatory effects. At that time, male students were offered 'shop, wood-working and automotive' courses as electives, while female students took 'typing, cooking and sewing' classes. Needless to say, this system limited choice available to both sexes and produced very few women who were eligible for entrance into, or even knowledgeable about, the trades. To counter-act this situation, special courses have been designed across the country for women to give them exposure to those trades they missed while in the education system. Classes such as these may be restricted to women only, as they have been specifically designed to meet their needs, and this is an example of an affirmative action program.

The first Canadian provision for "approved programs" was adopted by Nova Scotia in 1969. It is now section 19 of the Nova Scotia Human Rights Act:

> 19. The Commission may approve programs of government, private organizations or persons designed to promote the welfare of any class of individuals, and any approved program shall be deemed not to be a violation of the prohibitions of this Act.

British Columbia adopted a similar provision in 1973, as have the Northwest Territories, New Brunswick, Saskatchewan, Manitoba, Ontario, Alberta, Prince Edward Island, and the federal Commission.

In the United States, they have attempted to remedy systemic discrimination through the quota system. There, employers may be forced to hire quotas of people belonging to target groups (i.e. women,

visible minorities, the disabled). No Canadian jurisdiction has followed this type of remedy. Rather, the approach in Canada has been on affirmative action programs which are designed to improve the qualifications and opportunities of traditionally disadvantaged groups.

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